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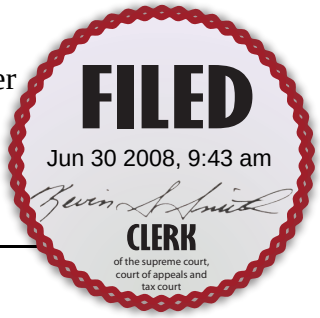

IN THE COURT OF APPEALS OF INDIANA

IN RE THE ADOPTION OF A.J., A MINOR CHILD,	)	
BRENDA JOHNSON,	)	
Appellant-Respondent,	)	
vs.	)	No. 18A02-0801-CV-43
VELMA JOHNSON,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0705-AD-11

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Appealing from a decree of adoption, Brenda Johnson ("Mother") asserts that there was insufficient evidence to meet the standard of proof required to establish that her consent was unnecessary. We affirm.

Facts and Procedural History

The facts most favorable to the court's decision are as follows. On August 11, 1998, Mother gave birth to A.J., whose father is Kevin Johnson ("Father"). Mother was awarded custody of A.J. on December 3, 1999. However, the court granted Father temporary emergency custody on December 30, 1999, when Mother attempted suicide. Tr. at 35.

On June 15, 2000, the court issued an order setting out joint custody, granting physical custody to Father and awarding visitation to Mother. Appellant's App. at 117-20. Within that same order, the court found that Mother was then pregnant, thus the court opted to postpone a support order until after she gave birth to her second child. *Id*. at 119.

In late May and early June 2001, the parties filed various petitions and motions. The court heard two days of testimony regarding the matters. In August 2001, the court issued an order, which, *inter alia*, set out a $32.00 weekly child support obligation for Mother. *Id*. at 121-23. Also around that time, Mother relocated from Muncie, Indiana, to Kentucky.

Mother's last physical contact with A.J. was in early 2005, when Father stopped by Mother's residence on the way back from a trip to Florida. Tr. at 8.

On December 30, 2006, Father married Velma Johnson ("Wife"). Wife began caring for A.J. prior to her marriage to Father and has continued to be responsible for A.J.'s daily needs. Wife makes sure A.J. brushes his teeth, gets fed, and wears clean clothes. *Id*. at 18.

She also helps with homework, takes him to practices, doctor appointments, and tutoring, and arranges for daycare when she and Father work. *Id*.

On May 1, 2007, Wife filed a petition to adopt A.J. with Father's consent. On June 18, 2007, Mother filed a motion to contest the adoption. On September 24, 2007, the court held a hearing regarding whether Mother's consent was required for the adoption. Mother, Father, Wife, and others testified at the hearing.

The court entered "Findings of Fact, Conclusions of Law, and Judgment" on November 16, 2007. In pertinent part, the court found that Mother's "Consent to the Petition for Adoption should not be required" and thus that the adoption could be granted over her objection. App. at 6-10. On December 12, 2007, after hearing evidence, the court granted Wife's petition to adopt A.J.

Discussion and Decision

In concluding that Mother's consent for adoption was not required, the court relied upon the failure to communicate prong of Indiana Code Section 31-19-9-8(a)(2). App. at 8-10. In particular, the court determined that Wife had demonstrated that Mother had failed to communicate significantly with A.J. despite having the ability to do so during the requisite timeframe. We agree.

When reviewing the trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. *In re Adoption of Subzda*, 562 N.E.2d 745, 747 (Ind. Ct. App. 1990). We will not reweigh the evidence, but instead will examine the evidence most favorable to the trial court's decision together with reasonable inferences drawn therefrom, to determine

whether sufficient evidence exists to sustain the decision. *Matter of Adoption of Marcum*, 436 N.E.2d 102, 103 (Ind. Ct. App. 1982).

Generally, a petition to adopt a minor child "may be granted only if written consent to adoption has been executed by ... (2) The mother of a child born out of wedlock and the father of a child whose paternity has been established" via certain statutory methods. Ind. Code §§ 31-19-9-1; 31-14-20-2; 16-37-2-2.1. However, consent to adoption is not required if, for a period of at least one year, "[a] parent of a child in the custody of another person ... *fails without justifiable cause to communicate significantly with the child when able to do so*; or [ ] knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree."[1] Ind. Code § 31-19-9-8(a)(2) (emphasis added).

A petitioner for adoption without parental consent bears the burden of proving the statutory criteria for dispensing with such consent in Indiana Code Section 31-19-9-8(a)(2) by clear, cogent, and indubitable evidence. *In re Adoption of Augustyniak*, 505 N.E.2d 868, 870 (Ind. Ct. App. 1987), *reh'g denied by* 508 N.E.2d 1307, *trans. denied*. If the evidence most favorable to the judgment clearly, cogently, and indubitably establishes one of the criteria for granting adoption without parental consent and, thereby, for the termination of parental rights without consent, we will affirm the judgment. *In re Adoption of Childers*, 441 N.E.2d 976, 978 (Ind. Ct. App. 1982). It is the appellant's burden to overcome the

[1] The court specifically found that Wife had *not* established by clear, cogent and indubitable evidence that Mother failed to pay support when she had the ability to do so (the other prong of Ind. Code § 31-19-9(s)(2)). Indeed, the court recognized that Mother had not explained why she had failed to pay any support from the summer of 2001 through December 2004, a time period when she was working. However, the court pointed out the reasonable inference that Mother's scarce resources had been used to support herself and her other children during that time. App. at 7-8. Thus, the court was unwilling to conclude that Wife had met her

presumption that the trial court's decision is correct. *McElvain v. Hite*, 800 N.E.2d 947, 949 (Ind. Ct. App. 2003).

Keeping in mind the facts already outlined in the "Facts and Procedural History," *supra*, we examine the following additional evidence gleaned from the consent hearing. Mother has been residing in Kentucky since 2001. She now has three additional children: a seven-year-old daughter, a five-year-old son, and an eighteen-month-old daughter. She "live[s] off Three Hundred and Twenty-four Dollars ($324.00) a month," which she receives from the State "on [her] other children." Tr. at 25. She does not work but is attending classes. During the six years that have elapsed since the support order for A.J. went into effect, Mother apparently has made one $36.00 support payment – on the day of the September 2007 consent hearing. *Id*. at 25, 28.

During the three-year period prior to the September 2007 hearing, Mother has had one phone contact with A.J. Within that same time, Mother called or received weekly or every-other-week calls from a friend in another state. Mother claimed to have sent cards to A.J. "maybe 7 or 8 times" over the "last several years." *Id*. at 27. However, no responses were ever received, nor was any independent evidence of their existence offered. *Id*. Father, who has had the same cell phone number for the past six or seven years, has not failed or refused to allow Mother to have contact with A.J. *Id*. at 12.

In an effort to prove visits, Mother submitted photos, but they were dated 2003 or 2004. Mother explained her failure to exercise visitation with A.J. at his Muncie-area residence by noting the five-hour drive from her home in Kentucky and the fact that her

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burden based on the failure to support criteria.

driver's license was suspended. *Id*. at 23-24, 34. Mother learned in October 2006 that her license was suspended for two years. She believed it was suspended "for child support," but as of September 24, 2007, she had not checked into it yet. *Id*. at 34-35. Mother's mother transported her to court on the day of the consent hearing.

Applying the appropriate standard of review, we cannot say that the aforementioned evidence leads to a conclusion opposite that reached by the trial judge. To the contrary, the evidence most favorable to the judgment clearly, cogently, and indubitably establishes that Mother failed without justifiable cause to communicate significantly with A.J. when able to do so during the relevant one-year period. Accordingly, Mother's consent was not needed to grant Wife's petition to adopt A.J. In reaching our conclusion, we quote a portion of the lower court's thoughtful, five-page order of November 16, 2007:

> The evidence indicates one telephone call during the one-year statutory period from [Mother] to [A.J.] [Father] and [Wife] did not recall any other contacts within the one-year period. [Mother] did not present any credible evidence as to any other contacts. To the extent there was other contact between [Mother] and [A.J.], the Court finds they were "token efforts" and not significant. The communication between a non-custodial parent and a child must be not only significant but also more than a "token effort." *Rust v. Lawson*, 714 N.E.2d 769, 772 (Ind. Ct. App. 1999), *trans. denied*[.]
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> This is a situation where [Mother] is not a "bad" mother, but she is a busy mother, with three other, younger children, and she is going to school to try to improve herself and to earn more money to give her children a better life. This is very commendable on [Mother's] part.
>
> Indiana Code 31-19-9-8, however, contains the Legislature's intent to "encourage non-custodial parents to maintain communication with their children and to discourage [them] from visiting … just often enough to thwart the adoptive parents' efforts to provide a settled environment for the children." *Id.* The law requires a non-custodial parent to make an effort, to call, to write, to make an occasional visit, no matter how busy the non-custodial parent's life becomes. It is not fair to require the child to wait for his mother to make time for him in her busy schedule. What happens is exactly what happened in this

> case: the child bonds with the stepmother and starts calling her "Mom" and looks to her for the nurturing a mother provides.

App. at 9-10. Wife has stepped up to fill the nurturer role in the life of A.J. Mother, for all practical purposes, has been absent from his life during the past few years. By failing to communicate for so long, Mother forfeited her right to contest the petition to adopt A.J. In sum, Mother has not met her burden to overcome the presumption that the trial court's decision was correct. *McElvain*, 800 N.E.2d at 949.

Affirmed.

BARNES, J., and BRADFORD, J., concur.